UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PAUL N. AVANSINO
v.
U.S. POSTAL SERVICE

Docket No.
SF075299088

OPINION AND ORDER

The U.S. Postal Service removed appellant, Paul N. Avansino, from the position of Carrier in the Rancho Cordova, California, Post Office, effective June 12, 1979, based on a determination by the agency's medical officer that appellant was unable to perform the duties of a Carrier due to a physical disability caused by a chronic condition of the right knee. Appellant filed an appeal with the San Francisco Field Office of the Merit Systems Protection Board on June 28, 1979.

In an initial decision dated September 24, 1979, the presiding official found after a hearing that appellant's right knee condition had originally developed while appellant was in the military service and had been treated surgically prior to his employment with the agency beginning on October 12, 1977. Although a pre-employment physical examination indicated that the condition should not have affected his performance of the duties of a Carrier, appellant underwent surgical procedures for that condition again in September of 1978 and January of 1979. As a result of the condition, appellant was in a non-pay or unearned annual-sick leave status from January 10, 1979, through February 22, 1979, and from March 30, 1979, until June 12, 1979, when he was removed. In April of 1979, appellant was examined by his personal physician and by the agency medical officer, both of whom diagnosed appellant as unfit for Carrier duties because of a disability of his right knee.

Appellant argued on appeal that, despite his physical disability to perform his duties as a Carrier, he should have been reassigned to another position within the agency for which he did qualify, such as that of Distribution Clerk, rather than be removed. The written statement of appellant's personal physician, attached to his petition for appeal and introduced at the hearing, indicated that appellant should not take a job involving "excessive walking" but could take a position involving "standing and lifting." At the hearing, appellant testified that he was aware that a Distribution Clerk was required to be able to lift up to 70 pounds at a

time. The agency's medical officer testified, however, that since appellant's knee condition could be aggravated by prolonged walking, standing, or heavy lifting, he had recommended that appellant be reassigned to a position not involving such activities. In this connection, the agency established that appellant had been tested on May 19, 1979, for the position of Markup Clerk, Automated, but that he had been rated ineligible because of an unsatisfactory typing score.

Based on the evidence presented, the presiding official affirmed appellant's removal from the service, finding:

> (that) the agency made reasonable efforts to identify a position in which appellant could function without injury to himself and that, when those attempts proved unsuccessful, it acted within its discretion in initiating and effecting the separation of an individual who could no longer perform the duties of his position due to physical disability. Initial Decision at 3.

The initial decision notified appellant of the substantive and procedural requirements for filing a petition for review.

Appellant filed a timely petition for review "on the basis of new information regarding the decision and to correct information which was presented at the hearing." In his petition, appellant argued that the supplemental physician's statement attached to his petition supported appellant's position that he qualified for a Distribution Clerk position because he was able to lift loads weighing up to 70 pounds, as may be required of a Distribution Clerk. Appellant argued further that the copies of his time cards also attached to his petition showed that he worked at least two eight-hour days during the last few weeks of his employment and that the time cards conflicted with testimony and exhibits introduced at the hearing by the agency regarding additional, shorter time periods worked.

The agency responded to appellant's petition for review by noting that, as established at the hearing, the job description for Distribution Clerk requires that the incumbent stand for eight hours a day, sometimes lifting up to 70 pounds at a time. Because the agency's medical officer had diagnosed appellant's knee condition as chronic and recurring, also as established at the hearing, the agency argued that it properly concluded appellant could not function as a Distribution Clerk.

As specified by the presiding official in his initial decision, the Board's regulations provide at 5 C.F.R. 1201.115 that the Board may grant a petition for review when it is established that:

> (a) New and material evidence is available that, despite due diligence, was not available when the record was closed, or

(b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Since appellant's allegations in his petition for review relate only to the former criterion, the Board shall determine whether that requirement has been met.

Rule 60(b) of the Federal Rules of Civil Procedure provides, similarly, for relief from a final judgment or order by a court when a party establishes, *inter alia*, that there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." That "due diligence" requirement for newly discovered evidence may be analogized to the Board's "due diligence" requirement for new and material evidence because both relate to new evidence warranting reconsideration of an adjudicatory disposition at the first level. In construing Rule 60(b), the courts have required that the party offering the newly discovered evidence at least offer a reasonable explanation as to why the additional material or testimony could not have been supplied earlier. *See, e.g., United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 258 F.Supp. 735, 747 (D.Ore. 1966), *aff'd*, 404 F.2d 706 (9th Cir. 1968), *cert. den.*, 394 U.S. 921 (1969).

The Board's regulations provide at 5 C.F.R. 1201.57(a) that "(w)hen there is a hearing, the record shall be closed at the conclusion of the hearing." In the instant case the presiding official notified the parties of this rule shortly before concluding the hearing. Transcript at 32. The record shows further that appellant was notified more than two weeks before the hearing that the agency's medical officer was scheduled to testify regarding appellant's fitness for duty. When appellant did not then produce his own physician at the hearing to counter testimony by the agency's medical officer, he was precluded from arguing that testimony his physician could have proffered at the time of the hearing was "new and material evidence" that was not available when the record was closed.

Since the basis of appellant's appeal was that the agency should have reassigned him to a position within the agency for which he was qualified, namely, that of Distribution Clerk, it is reasonable to expect appellant to exercise "due diligence" in preparing to counter the agency's evidence that he was not physically qualified for it, by oral testimony or otherwise. If presenting appellant's physician as a witness would have been too expensive for appellant to afford, appellant could have introduced his physician's written statement at the hearing. Appellant has offered no reasonable explanation as to why such a statement could not have been supplied at that time. Thus, the written statement of appel-

lant's physician dated October 23, 1979, relating to appellant's ability to lift up to 70 pounds, cannot be deemed "not available when the record was closed," as required of "new and material evidence" by the Board's regulations. 5 C.F.R. 1201.115.

With regard to appellant's newly acquired time cards that allegedly conflict with testimony and exhibits presented by the agency at the hearing, these too fail to meet the "new and material evidence" criterion in that they were in fact available when the record was closed. That is, if appellant had exercised "due diligence," he should have been aware of the existence of the time cards and their relevance to his case, and could have obtained copies for introduction at the hearing by filing a discovery motion before the hearing, in accordance with the Board's regulations at 5 C.F.R. 1201.73.

The Board finds, therefore, that neither evidentiary submission of appellant in connection with his petition for review meets the requirement of newly available material evidence under the regulations of the Board. Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board. Appellant is hereby advised of his statutory right under 5 U.S.C. 7703 to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty calendar days of receipt of this decision by the Board.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 26, 1980*